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No. 05-1256

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF AMICUS CURIAE OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The Alliance of Automobile Manufacturers, formed in 1999, is a nonprofit trade association of nine car and light truck manufacturers.[1] The members of the Alliance—BMW Group, DaimlerChrysler Corporation, Ford Motor Company, General Motors Corporation, Mazda North American Operations, Mitsubishi Motors North America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc., and

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

Volkswagen of America, Inc.—account for more than 80% of motor vehicle sales in the United States.

Alliance members, and other automobile manufacturers, are affected by the phenomenon of skyrocketing punitive damages more than perhaps any other type of product manufacturer or defendant. When motor vehicles are involved in accidents, serious injury or death can result—even when the vehicles are equipped with the latest and best safety features. Plaintiffs often seek large punitive awards in such cases, and juries often award them. The large corporations that make automobiles are tempting targets for the plaintiff's bar, and are viewed as deep pockets by some juries.

Countless design choices and engineering trade-offs go into making an automobile. Some choices are demanded by the laws of physics. Others are compelled by cost-benefit calculations. As a result, automobile manufacturers frequently are subjected to enormous punitive awards by a jury applying general state common law standards—even though the design at issue complies with industry custom and practice, even though the product meets or exceeds the standard set by federal regulations, even though plaintiffs' design defect claim has been considered and rejected by the federal agency responsible for regulating motor vehicle safety, and even though numerous previous juries have returned defense verdicts in cases challenging the design. The decision below, which effectively eliminates the constitutional ceiling on the amount of punitive damages in any products liability case involving serious personal injury, promises to exacerbate the unfairness of this situation.

The Alliance offers this brief because of the great stake that its members have in seeing that the federal due process limits on punitive damage awards are clarified and strengthened in the products liability context. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a).

SUMMARY OF ARGUMENT

The limits placed by this Court on the size of punitive damage awards find support in both the substantive and procedural components of due process. "[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.' " *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 453-454 (1993) (plurality opinion) (quoting *Seaboard Air Lines Ry.* v. *Seegers*, 207 U.S. 73, 78 (1907)). In addition to these substantive considerations, "[e]lementary notions of fairness * * * dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996). Although this Court has established three guideposts for courts to use to identify and enforce these substantive and procedural limits, if the ruling under review stands they will henceforth mark only a one-way climb to ever-higher punitive damage awards. That consequence is one that would be felt particularly acutely by this Nation's automobile industry, which is a pillar of our modern economy and provides products of immense and obvious benefit.

Automobile manufacturers are already subject to wildly unpredictable but ever-increasing punitive exactions for design choices that reflect considered engineering judgments, that meet or exceed industry standards and federal regulations, and that often have been validated repeatedly by regulators, judges and juries. But authorizing juries to rely on the reprehensibility guidepost to "override" any consideration of the relationship that an exaction bears to the harm the plaintiff suffered—as the Oregon Supreme Court sanctioned here—threatens automobile manufacturers with even greater punishment for making socially-responsible and necessary risk-utility trade-offs. Products liability law encourages manufacturers to weigh the costs and benefits of any design decision, but juries (and reviewing courts) frequently and incorrectly equate that balancing act with intent to harm the plaintiff—and are provoked to punish the defendant accordingly. If punitive exactions are not meaningfully

anchored to the plaintiff's harm, but are instead keyed only to a subjective appraisal of the reprehensibility of the defendant's conduct, such exactions will rocket skyward with nothing to check them. That outcome is inconsistent with the proper functioning of the guideposts and, as a consequence, would dampen product innovation and lead to more costly but less safe products.

Furthermore, allowing a jury to calculate the amount of a punitive exaction based on speculations of the total harm that a product caused the consuming public at large—as did the court below—conflicts with this Court's precedents and fundamental due process principles. It also would increase the risk of multiple, excessive punishments for a single course of conduct and permit a lone, aberrant jury to countermand the judgments of other juries and government regulators.

ARGUMENT

I. UNDER THE OREGON SUPREME COURT'S RULING, AUTOMOBILE MANUFACTURERS WILL FACE CRUSHING PUNITIVE AWARDS FOR ENGAGING IN RESPONSIBLE AND LEGAL PRODUCT-DESIGN DECISION MAKING.

A. Automobiles, Like Other Useful Products, Are Lawful Because Their Utility Outweighs Their Risks.

The case *sub judice* involves cigarettes, a product very different from automobiles. Yet the resolution of this case will have significant consequences, not just for tobacco products, but for a wide range of consumer goods, including automobiles. Numerous products are legal to buy, sell and use despite known and potentially serious health and safety risks. Even a seemingly innocuous product like the toothpick poses a safety hazard—"over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*." *Corrosion Proof Fittings* v. *EPA*, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991) (citing Lawrence D. Budnick, *Toothpick-Related Injuries in the United States, 1979 Through 1982,*

252 J. AM. MED. ASS'N 796 (1984)). For its part, the automobile remains a key mode of human transportation—indispensable to the national economy and the modern way of life—even though thousands are injured or killed annually in automobile accidents.

Society tolerates the risks posed by toothpicks, automobiles, and countless other products because their significant utility outweighs those risks—the product's benefits trump its costs. Some of the risks associated with these products are simply inherent and cannot be alleviated no matter what value is placed on safety. *See* Robert S. Adler, *Redesigning People Versus Redesigning Products: The Consumer Product Safety Commission Addresses Product Misuse*, 11 J.L. & POL. 79, 79 (1995) ("Regrettably, if society is to enjoy the benefits of consumer products, some risks appear unavoidable."); *see also Lachance* v. *American Home Prods. Corp.*, No. 01-0890-CV-W, 2006 WL 89850, at *4 (W.D. Mo. Jan. 13, 2006) ("A knife is an unavoidably unsafe product because [it is] useful and desirable to society but cannot be produced without some risk."). Automobiles would be a far less valuable mode of transportation if they could travel only at very low speeds, and toothpicks would be useless without their sharp ends.

Other safety risks are accepted because their reduction would come at too high a price. In the case of the automobile, Justice Breyer has notably explained that consumers are not likely to pay a significant premium for only marginally safer vehicles. *See* Stephen J. Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 13-14 (1993) ("It seems unlikely that the public would pay 24 to 60 times more per car to save far fewer lives."). This is so because "[a]t some point, the cost of additional safety improvements becomes so great that additional safety measures are not worthwhile." W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 561 (2000). Since consumers will not pay to alleviate avoidable safety risks when the price of doing so exceeds the value of the added safety, manufacturers do not (and should not)

mitigate all known product hazards. Indeed, "[t]he failure to obtain risk-free products will occur regardless of whether it is the consumer or the producer who makes the safety decision." *Id.* "Tradeoffs will and must be made." *Id.* at 566.

This inherent cost constraint on product safety is reflected in the law of products liability. In most jurisdictions, a jury tasked with determining whether a product is "defective" must engage in the same sort of risk-utility analysis that keeps our roads from being clogged with armored personnel carriers. *See, e.g., Soule* v. *General Motors Corp.*, 882 P.2d 298, 311 (Cal. 1994) (jury must determine whether automobile design is defective based on "such competing design considerations as risk, benefit, feasibility, and cost"); *see generally* AMERICAN LAW OF PRODUCTS LIABILITY § 28:17 (Timothy E. Travers *et al.* eds., 3d ed. 1997) ("[M]ost jurisdictions resolve the issue of whether the product is defective by applying some form of risk-utility analysis."); *id.* § 1:22 ("The overwhelming consensus among courts deciding design defect cases today is in the use of some form of risk-utility analysis."). That analysis calls for "balanc[ing] benefits and costs to society as a whole, including the manufacturer and all consumers foreseeably affected, not just the litigating parties." Meiring de Villiers, *Technological Risk & Issue Preclusion: A Legal & Policy Critique*, 9 CORNELL J.L. & PUB. POL'Y 523, 527 (2000). As commentators have explained, "[t]he social costs considered in risk-utility balancing are the costs of adopting better, safer technology, including both capital and operating costs. The relevant benefits are reductions in accident costs achieved by reducing both the likelihood and the severity of product-related accidents." James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 883 (1998) (footnote omitted).

Thus, whether a manufacturer has struck an appropriate balance between benefits and costs—and consequently whether it is liable for an allegedly defective product—should ultimately "depend on whether the net increase in safety (net numbers of lives saved by switching designs)

outweigh[s] the increase in cost and utility." de Villiers, *supra*, 9 CORNELL J.L. & PUB. POL'Y at 528. A responsible manufacturer therefore appropriately considers not only product safety but also "elements such as marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor." Richard C. Ausness, *Retribution & Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 88-89 (1986).

B. Automobile Manufacturers Are Subject To Random—And Enormous—Punitive Exactions For Their Product-Design Decisions.

While "[c]ost-benefit analysis is fundamental to the design engineer's trade," David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 24 (1982), and striking a balance between cost, utility, and product safety implicates a "morass of conceptual, political and practical issues," *id.* at 37, current constitutional standards afford automobile manufacturers little protection from unpredictable and irrational punitive damage awards for making necessary trade-offs in the designs of their products. These trade-offs are an integral part of any product design, including the designs of the various systems in automobiles, but when a given choice will subject an automobile manufacturer to a punitive exaction is no more predictable than a lightning strike. Design choices that meet or exceed federal safety regulations and industry standards—or that have been approved of by numerous juries and validated by real-world testing and that reflect responsible design choices—are routinely the object of juror outrage and the subject of massive punitive awards. Imposing unlimited punitive awards for such design choices, without rhyme or reason, conflicts with the "[e]lementary notions of fairness" and "adequate notice" embodied in the Due Process Clause. *Gore*, 517 U.S. at 574.

Experience shows that automobile manufacturers are frequently punished for making design choices that reflect the

considered, good-faith balancing of multiple and competing safety considerations. In *Flax* v. *Daimler Chrysler Corp.*, No. 02C-1288, 2005 WL 1768725 (Tenn. Cir. Ct. June 20, 2005), for example, a Chrysler minivan in which Joshua Flax was a passenger was rear-ended by a pickup truck. The front seats yielded rearward, as designed, absorbing the energy of the impact. As the seat yielded backwards, however, the front passenger's head hit Joshua's head, causing the latter fatal brain damage. In the ensuing lawsuit, plaintiff alleged that the front seat was defectively designed because it was not sufficiently rigid. Yet, the seat's design met the industry standard. Moreover, seatback strength is specifically regulated by Federal Motor Vehicle Safety Standards—which are required by federal law to "meet the need for motor vehicle safety," 49 U.S.C. § 30111(a)[2]—and the Chrysler seatback was nearly three times more rigid than required by the federal standard. And, as explained in another case involving the same Chrysler yielding seat design—where the jury found the same seat design *non-defective*—a more rigid front seat would *increase* the risk of injury in many other collisions because it would "virtually slingshot the occupant in the event of a rear impact." *Gardner* v. *Chrysler Corp.*, 89 F.3d 729, 740 (10th Cir. 1996).

Even though Chrysler's yielding design may have been safer overall than a more rigid design, the jury in *Flax* levied a $98 million punitive exaction against Chrysler, and the trial court upheld the jury's verdict. The court found that Chrysler's conduct was "indeed reprehensible" because Chrysler "was aware that its yielding minivan seats were causing

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[2] The National Traffic and Motor Vehicle Safety Act provides that "[e]ach [motor vehicle safety] standard shall be practicable, *meet the need for motor vehicle safety*, and be stated in objective terms." 49 U.S.C. § 30111(a) (emphasis added). And "motor vehicle safety" means "the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident." *Id.* § 30102(a)(8).

injury and death." 2005 WL 1768725, at *3. This finding of reprehensibility is clearly suspect, if not irrational, because Chrysler was equally aware that rigid seats would *also* cause injury and deaths; thus, the same basis for arguing that Chrysler acted reprehensibly by making yielding seats could have been made had Chrysler made rigid seats. The extent of the punishment that could be assessed against Chrysler was at least limited by this Court's decisions in *Gore* and *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003); applying those decisions, the trial court reduced the punitive award from $98 million to $20 million. 2005 WL 1768725, at *5. If plaintiff in the instant case is correct, however, Chrysler would have been exposed to unlimited punishment for what, in truth, might well have been socially responsible conduct.[3]

The result in *Flax* is not unusual. In *Anderson* v. *General Motors Corp.*, Los Angeles County (Calif.) Superior Court No. BC 116926, *notice of appeal filed*, No. B135147 (Cal. Ct. App. Sept. 9, 1999), people injured in a post-collision fire sued General Motors, claiming that placement of the gasoline tank behind the rear axle in the 1979 Chevrolet Malibu in which they were riding created an excessive danger of fuel-fed fire in the event of a crash. But fuel system integrity—like seatback design—is specifically regulated by Federal Motor Vehicle Safety Standards, and the 1979 Chevrolet Malibu met all of those requirements. GM engineers indeed considered placing the Malibu's fuel tank over the rear axle (as recommended by plaintiff's expert at trial) but—

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[3] The Arizona Court of Appeals recently overturned a $50 million punitive damages award against DaimlerChrysler in a case involving an alleged defect in the front seat strength of a Dodge Ram club cab pickup truck. *See Douglas* v. *DaimlerChrysler Corp.*, No. CY2001-019659 (Ariz. Ct. App. Div. 1 Oct. 13, 2005), mem. op. ¶ 23. The court recognized that "a proper balance between seat yield and stiffness was needed to protect passengers during collisions" and further noted that "Daimler designed its seat to withstand a rearward movement of 8,759 inch-pounds, almost three times the required Federal Motor Vehicle Standard 207." *Id.* at ¶ 17.

following real-world testing of both the over-the-axle and behind-the-axle designs—they decided to place the vehicle's tank in the same location as 98% of the other vehicles marketed instead: behind the rear axle. In their judgment, the over-the-axle design on balance posed a greater safety hazard in the event of a collision, as it was located closer to the vehicle's passengers, and was also less functional and harder to service. The jury nevertheless found the fuel tank placement defective—although it did so without ever hearing evidence of the Malibu's exemplary safety record in the field because the trial court excluded the evidence GM offered to show that the Malibu's fire risk in rear-end collisions was extremely remote and as low or lower than that of similar vehicles. And with its verdict, the jury delivered an astonishing $4.8 billion punitive damage award to plaintiffs, an award that the trial court reduced, based on *Gore*, to an almost equally astonishing $1.09 billion.

One more example should suffice to illustrate the sheer randomness with which punitive awards are imposed on automobile manufacturers. In *Buell-Wilson* v. *Ford Motor Co.*, __ Cal. Rptr. __, 2006 WL 2002858 (Ct. App. July 19, 2006), the driver of a 1997 Ford Explorer lost control of her vehicle when she swerved to avoid an object in the road. The vehicle rolled over, and the driver was rendered a paraplegic. Plaintiff alleged that the Explorer was unreasonably dangerous both because it was prone to roll over in emergency avoidance maneuvers and its roof was insufficiently crush-resistant. *See id.* at *2, *6.

It has been generally known for decades that sport utility vehicles like the Explorer handle differently and are more likely to roll over than passenger cars. *See, e.g., In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 982 F. Supp. 388, 391-392, 396 (E.D. La. 1997). Nevertheless, the National Highway Traffic Safety Administration ("NHTSA") has repeatedly refused to find SUVs defective for this reason because SUVs offer advantages that passenger cars do not. *See* 64 Fed. Reg. 27,343 (May 19, 1999) (summarizing

NHTSA's investigations of various SUVs).[4] Plaintiffs in *Buell-Wilson* condemned the Explorer as having the same stability defects as the Bronco II, but NHTSA has *twice* investigated the Bronco II and refused to find that it is defective. *See* 64 Fed. Reg. 27,343. For decades, NHTSA has been studying ways to measure and evaluate resistance to rollover, and it has repeatedly rejected the two methods relied upon by plaintiffs to condemn the Explorer.[5] And, if permitted, Ford would have presented to the jury accident statistics showing that Explorers do not roll over any more frequently than competitive SUVs, but the trial court excluded this evidence.

Prior to the trial in *Buell-Wilson*, Ford had never lost an Explorer rollover case, and 13 juries had returned defense verdicts in such cases.[6] But the *Buell-Wilson* jury—completely uninformed of how the Explorer was actually performing in the real world—returned a verdict awarding $246 million in punitive damages. The California Court of

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[4] For example, NHTSA has recognized that "redesigning a vehicle to significantly reduce its likelihood of rolling over necessarily involves making fundamental changes in the vehicle's dimensions (making it wider, longer, lower, heavier) and compromising its utility to consumers (e.g., by reducing its fuel efficiency, ground clearance, load-carrying capacity, off-road capability, or driveability on snowy roads)." 61 Fed. Reg. 28,550, 28,552 (June 5, 1996).

[5] *See, e.g.*, 53 Fed. Reg. 34,866, 34,867 (Sept. 8, 1988) ("the stability factor [is] not sufficiently reliable or discriminating among vehicles to identify a defect"); *id.* (Consumers Union "test procedures do not have a scientific basis and cannot be linked to real-world crash avoidance needs, or actual crash data."); 52 Fed. Reg. 49,033, 49,035 (Dec. 29, 1987).

[6] Ford has also received favorable results in Explorer roll over cases since that time. *See Shatz* v. *Ford Motor Co.*, 412 F. Supp. 2d 581 (N.D. W. Va. 2006) (jury verdict in Ford's favor); *Davis* v. *Ford Motor Co.*, No. Civ. A. 302CV271LN, 2006 WL 83500 (D. Miss. Jan. 11, 2006) (mem. op.) (judgment as a matter of law in Ford's favor); *cf. Jaramillo* v. *Ford Motor Co.*, 116 Fed. Appx. 76 (9th Cir. 2004) (initial jury verdict in favor of Ford reversed and remanded for new trial).

Appeal disregarded the 13 prior verdicts, ruled that evidence of the Explorer's performance relative to other SUVs was irrelevant and inadmissible, and found that Ford's conduct was highly reprehensible—even though reasonable people, including the federal government, might conclude in good faith that the Explorer was not defective. Nevertheless, applying this Court's decisions in *Gore* and *State Farm*, the court reduced the punitive award to $55 million, or two times the compensatory damages. Thus, once again, the ratio guidepost at least limited the amount of punitive damages that could be assessed for "highly reprehensible" conduct that, in truth, probably was not reprehensible at all.

Similar examples abound, demonstrating the unpredictability of a jury's decision to punish an automobile manufacturer for a design choice and the tendency of reviewing courts to defer to such jury decisions. *See, e.g.*, *General Motors* v. *Moseley*, 447 S.E.2d 302 (Ga. Ct. App. 1994) ($101 million punitive award not excessive even though side-saddle fuel tank design at issue met applicable NHTSA safety standard), *overruled on other grounds*, *Webster* v. *Boyett*, 496 S.E.2d 459 (Ga. 1998); *Clark* v. *Chrysler*, 310 F.3d 461, 469 (6th Cir. 2002) (punitive award based on door latch design affirmed because court concluded that the relevant federal motor vehicle safety standard did not reflect how a latch would perform in a real accident), *vacated & remanded*, 540 U.S. 801 (2003), *appeal after remand*, 436 F.3d 594 (6th Cir. 2006); *Jablonski* v. *Ford Motor Co.*, No. 03-L-2027, 2005 WL 2837524 (Ill. Cir. Ct. Apr. 28, 2005) (judgment) (punitive damages approved by trial court even though design of 1993 Town Car's fuel system met federal motor vehicle safety standard that did not go into effect until 2006).

The unpredictability of the current legal environment will, however, be overshadowed by the severity of the punitive exactions levied and upheld against automobile manufactures for making conscious design choices if the reprehensibility guidepost is converted from "the most important indicium of the reasonableness of a punitive damages award," *Gore*, 517 U.S. at 575, into a constitutional trump card that reviewing

courts may play in fulfilling their constitutionally-mandated role to review punitive damage awards for compliance with due process. *See Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 21 (1991) ("[A]ppellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose.").

C. If The Reprehensibility Guidepost May "Override" Other Due Process Limits On Punitive Damages, Manufacturers Will Face Even More Severe Punitive Exactions For Any Product Design That Carries Risks.

If the reprehensibility guidepost is nothing more than a "competitive tool[ ]" (Pet. App. 32a) that may be employed to "overrid[e]" (*id.* at 33a) the ratio guidepost, the sky is the limit for punitive damage awards in products liability cases involving serious personal injury. As Justice Breyer warned in *Gore*, "reprehensibility" would be "a concept without constraining force" because it would be drained of "its constraining power to protect against serious and capricious deprivations" of private property. *Gore*, 517 U.S. at 590 (Breyer, J., concurring).

Although products liability cases do not inherently belong at the high side of the reprehensibility scale, there is an erroneous tendency automatically to place them there simply because such cases usually involve serious injury or death, and because jurors view the harms suffered by the plaintiff through the distorting but powerful lens of hindsight bias. While manufacturers must design products based on multiple and abstract considerations, jurors (and reviewing courts) frequently discount considerations such as cost or product "marketability, appearance, ease of operation, durability, [and] freedom from maintenance or repair," Ausness, *supra*, 74 KY. L.J. at 88-89, when confronted by real injury or death. "So long as jurors are drawn—as they must be—from the general population, it seems unrealistic to expect the jury to disregard this basic belief [*i.e.*, that life is priceless] either in determining liability or in ruling on punitive damages." Gary T. Schwartz, *Deterrence & Punishment in the Common Law*

of Punitive Damages: A Comment, 56 S. CAL. L. REV. 133, 152 (1982). Thus, rather than comparing "expected benefits and costs based on the state of information before the accident," jurors instead "may compare the enormous cost to the victim with the relatively negligible cost of the safety improvement" after an accident has already occurred and the manufacturer haled into court. Viscusi, *supra*, 52 STAN. L. REV. at 563.

Judge Easterbrook aptly described this phenomenon in a case involving a woman injured when someone pressed the emergency stop button on the escalator she was riding.

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. Engineers design [products] to minimize the sum of construction, operation and injury costs. * * *
>
> Come the lawsuit, however, the passenger injured by a stop presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured if buttons were harder to find and use are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. * * * [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states. [*Carroll* v. *Otis Elevator Co.*, 896 F.2d 210, 215-216 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted).]

But Judge Easterbrook is not alone in recognizing the hindsight bias problem. *See, e.g.*, W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 116 (2001) (corporations' "superior ex ante risk judgments may be outweighed by the ex post reality of the accident victim"); Viscusi, *supra*, 52 STAN. L. REV. at 552 (mock juror study showing that proper risk balancing inflates punitive awards against corporations). As another

commentator explained, "jurors have a natural sympathy for a seriously injured person that is reinforced when the defendant is a manufacturer, for many persons are hostile toward major institutions in general and 'big business' in particular." Owen, *supra*, 49 U. CHI. L. REV. at 11 (footnote omitted).

This inherent bias—which operates to artificially locate any products case at the high-end of the reprehensibility scale from the outset—is exacerbated when the plaintiff can demonstrate that the manufacturer undertook risk-utility analysis in selecting a product design. Notwithstanding that responsible manufacturers "think about risks in a systematic matter and * * * undertake [cost-benefit] calculations to ensure that there is appropriate risk balancing that is sufficiently protective" (Viscusi, *supra*, 52 STAN. L. REV. at 550)—and, in most jurisdictions, are subject to liability only for erroneous calculations—jurors and reviewing courts frequently regard such assessments as base financial calculations worthy of extreme sanction. "[O]ne person's sound engineering is another person's trading lives for profits." Owen, *supra*, 49 U. CHI. L. REV. at 47.

The paradoxical consequence is that, while systematic risk-utility analysis *ex ante* is the stuff of responsible corporate decision-making that products liability law affirmatively encourages, *ex post* it is a "red flag[ ]" signaling nothing short of "callous disregard for human health" and the concomitant need for a serious punishment. Viscusi, *supra*, 52 STAN. L. REV. at 578. Commentators have noted how this unfolds in the typical products case: "Regardless of how high the manufacturer sets the design standard, when an accident does occur, the plaintiff's lawyer will have an expert testify [that] the product could have been made safer, and the injury prevented, if the manufacturer had just been willing to spend some additional money." Andrew C. Clausen & Annette M. Carwie, *Problems Applying the* Life of Georgia *v.* Johnson *Case in the Product Liability Setting: Where Do We Go With Punitive Damages After* BMW *v.* Gore*?*, 58 ALA. LAW REV. 46, 48 (1997). And "[a]s a result, an argu-

ment for reprehensibility can be supported in virtually every case." *Id.*

In the products liability setting, therefore, there is a real danger that the reprehensibility guidepost will become not a meaningful trigger for imposing punitive awards or identifying excessive ones, but a one-way lever for ratcheting them ever skyward. Design defect cases necessarily come with intent to harm the plaintiff "built in," Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 VILL. L. REV. 353, 356 (1994), because "a manufacturer's choices involving necessary safety trade-offs and statistically inevitable risks always can be viewed in a sense as intentional wrongs to consumers hurt by such products, as safe on balance as such products may actually be." Owen, *supra*, 49 U. CHI. L. REV. at 26 (footnote omitted). *See also* Viscusi, *supra*, 52 STAN. L. REV. at 566 ("[U]ndertaking [cost-benefit] analysis and making a conscious decision to forego the improvement will subject a company to the charge that it 'deliberately intended to injure the plaintiff.' ").[7] Thus, if every design adopted in the face of known risks can be treated as an intentional wrong, "every actor could be held strictly liable * * * for punitive, in addition to compensatory, damages for any consequence to any person that was contemplated in advance of any course of action." Owen, *supra*, 49 U. CHI. L. REV. at 22. *See also id.* at 23 ("The decision to market a product in a certain condition with certain risks may have been a good one because the expected benefits were great, and the product may not have been legally defective at all, yet under this standard the manufacturer remains subject to punishment for 'disregarding' the lesser risk by proceeding to sell the product with any danger whatsoever.").

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[7] A claim of intentional misconduct may, moreover, be even further aggravated by the manufacturer's equally conscious—but lawful and legitimate—decision to market its product. *See, e.g., Nissan Motor Co.* v. *Armstrong*, 32 S.W.3d 701, 704 (Tex. Ct. App. 2000), *aff'd in part, rev'd in part & remanded*, 145 S.W.3d 131 (Tex. 2004). The promotion of a product deemed, in hindsight, to be "defective" can be easily—but incorrectly—labeled "fraud."

As the foregoing cases illustrate, juries often punish product manufacturers with punitive damage awards for thinking systematically about risk, and automobile manufacturers' conscious choices of designs that carry known safety hazards have frequently provoked particularly severe punishments. *See Ford Motor Co.* v. *Sasser*, 618 S.E.2d 47, 57 (Ga. Ct. App. 2005) (upholding punitive damages award, in part, because "various pre-production internal documents discussed" seat latch safety improvements but "Ford chose not to adopt" them). The case of *Grimshaw* v. *Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981), remains—even a quarter of a century later—a classic example. Grimshaw was severely injured when the Fort Pinto in which he was a passenger was hit from behind by another vehicle in a way that caused a fire. He subsequently claimed that the placement of the fuel tank behind the rear axle and the design of the fuel filler pipe were defective. The jury awarded $125 million in punitive damages (later reduced to $3.5 million) based, in part, on Ford's performance of a systematic cost-benefit analysis.[8]

Products liability cases already gravitate toward the high end of the reprehensibility scale, but for reasons unrelated to the true reprehensibility of the conduct at issue. The approach of the court below will exacerbate this dynamic by permitting jurors and reviewing courts to rely exclusively on the reprehensibility guidepost to punish automobile manufacturers for undertaking what might well be viewed, outside of the courtroom, as responsible risk-utility analysis.

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[8] One commentator has explained that the corporate document containing Ford's cost-benefit analysis "has been assigned an operational significance that it never possessed, and has been condemned as unethical on account of characterizations of the document that are in significant part unwarranted." Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1026 (1991).

D. Punishing Automakers For Making Risk-Utility Calculations Creates The Wrong Incentives.

Punitive damages, as this Court has repeatedly observed, are intended to punish misbehavior and thereby discourage its recurrence. *See, e.g., Cooper Indus. Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (punitive damages "operate as 'private fines' intended to punish the defendant and deter future wrongdoing"); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."). But current constitutional standards for review of such awards do not afford automobile manufacturers significant guidance in choosing designs that will not subject them to severe punishment by a civil jury.

The upshot of the ruling below—that the reprehensibility guidepost may override the ratio guidepost—is not simply another ripple of uncertainty in the punitive damages terrain. It will operate to further deter manufacturers from consciously engaging in the responsible, systematic risk-utility analysis that products liability law is actually intended to foster because design choices adopted in light of such analysis will expose them to more severe punishment than those that are not. As one commentator explained, "[r]isk analyses and, in particular, analyses that values lives highly, are harmful to the company's prospects, whereas failing to think systematically about risks and undervaluing human life is a less costly corporate strategy." Viscusi, *supra*, 52 STAN. L. REV. at 588; *see also* Schwartz, *supra*, 43 RUTGERS L. REV. at 1037 ("Not only does this risk-benefit liability standard *tolerate* situations in which the manufacturer trades off safety for the sake of cost, but the standard rests * * * on a philosophy which actually *encourages* manufacturers to consider such trade-offs, a philosophy that specifies that the welfare of society is generally enhanced when the manufacturer chooses a design that strikes the right balance between advantages and disadvantages.") (emphases in original).

The rule announced by the court below would create perverse incentives with untoward consequences for society. In fact, it would lead to consumer products that are less safe. Consider that a responsible product manufacturer contemplating a given safety improvement will "obtain a thorough understanding of the risks involved and how the safety device would affect those risks." Viscusi, *supra*, 52 STAN. L. REV. at 565. While that comprehensive assessment could be expected to lead the manufacturer to opt for an efficient level of safety—*i.e.*, it would only adopt the safety improvement if its benefits outweighed its costs—the manufacturer would not risk performing the assessment if declining to adopt the innovation (because its costs exceeded its benefits) would expose it to a severe penalty for "explicitly trading off lives against money." *Id.*

By the same token, "the more a manufacturer is truly concerned about its product's safety, the more it will encourage self-criticism and 'negative' analyses of the product within the company." Owen, *supra*, 49 U. CHI. L. REV. at 17. Indeed, "it often is desirable during the initial stages of a product's design to test it to its limits to discover what those limits are." *Id.* at 17-18. These efforts are desirable to society because exposing a product's weaknesses and exploring dissatisfaction with it lead the manufacturer to produce a superior product. *See id.* at 18. Nevertheless, a manufacturer would rethink such efforts if doing so were tantamount to sowing "the documentary seeds for a punitive damages claim in a future products suit." *Id.*

The exorbitant punitive damage awards in products liability cases that are a by-product of systematic risk-utility analysis and product testing also inevitably lead to less innovation. Such awards "tend to discourage participation in the underlying economic activity." *Perez* v. *Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 622 (7th Cir. 2000). In other words, "if damages exceed harm, parties may be led to curtail their activities to an inappropriate extent—to refrain from engaging in them even when the benefits exceed the harms caused." A. Mitchell Polinsky & Steven Shavell, *Punitive*

Damages: An Economic Analysis, 111 HARV. L. REV. 869, 882 (1998). Consequently, "a firm might be induced to withdraw its product from the marketplace even though consumers place a higher value on the product than its full cost of production, which includes the average harm caused by the product." *Id.* *See also* Cass R. Sunstein, *et al.*, *Assessing Punitive Damages (With Notes on Cognition & Valuation in Law)*, 107 YALE L.J. 2071, 2077 & nn.22-23 (1998) ("[A]s a practical matter, a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies.").

II. PUNISHING A DEFENDANT FOR SPECULATIVE HARMS TO NON-PARTIES IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND DUE PROCESS.

The ruling below approved of the plaintiff's invitation to the jury to punish Philip Morris for its harm to Jesse Williams as well as to other, unidentified persons like him that "have been" similarly injured in the "last 40 years" and the "many more out there in the future." Pet. for Cert. 2. This type of open-ended invitation to punish a defendant for speculative harms is a common feature of products liability lawsuits and one that, if the jury accepts it, predictably rockets punitive exactions into the financial stratosphere.[9]

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[9] *See* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 584 (2003) ("The plaintiff's attorney, although she usually represents only one (or, at most, a few) of the many victims, will typically ask the jury to impose punitive damages in an amount sufficient to punish the defendant not only for harming the plaintiff, but also for the full scope of the harm that its conduct caused to all victims and all of society."); *id.* at n.3 (citing cases). In *Sand Hill Energy, Inc.* v. *Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002), *vacated & remanded*, 538 U.S. 1028 (2003), *decision on remand*, 142 S.W.3d 153 (Ky. 2004), the $20 million punitive exaction imposed on Ford was equivalent to $100,000 for each of 200 nationwide deaths that plaintiff's counsel claimed in his closing argument resulted from Ford's transmission design.

But it is also one that is fundamentally at odds with this Court's punitive damages jurisprudence and basic notions of fairness and due process.

A. Punitive Damages Must Bear A Rational Relationship To The Harm Suffered By The Plaintiff.

The notion that a jury may impose a punitive damages award that reflects assumed harms to unknown persons is irreconcilable with this Court's analytical framework for determining whether a punitive damage award comports with the Due Process Clause and its precedents implementing that framework. In particular, it is incompatible with this Court's second, ratio guidepost as well as this Court's explanation of the first, reprehensibility guidepost.

The Court explained in *Gore* that the "second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio *to the actual harm inflicted on the plaintiff*." *Gore*, 517 U.S. at 580 (emphasis added). But that was not the first—or last—time that this Court acknowledged that "the proposition that a comparison between the compensatory award and the punitive award is significant." *Id.* at 581. *See State Farm*, 538 U.S. at 418; *TXO*, 509 U.S. at 459; *Haslip*, 499 U.S. at 23. Recognizing that "traditional practice provides a touchstone for constitutional analysis," *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994), this Court has emphasized this "significant" proposition's time-tested pedigree. *Gore*, 517 U.S. at 580.

While the Oregon Supreme Court did not dispute the import of this guidepost in theory, its holding that a defendant may be punished for harms to unknown non-parties eviscerates it in practice. *Compare* Pet. App. 20a ("[W]e conclude that evidence of *similar* conduct against other parties may be relevant to a punitive damage award.") (emphasis in original) *with id.* at 31a ("[W]e conclude that the ratio guidepost considers only harm to the plaintiff."). A reviewing court simply cannot meaningfully evaluate under the ratio guidepost whether a given punitive damages award reasonably correlates to the harm suffered by the plaintiff—and therefore

is not excessive—if that very penalty is actually based upon harm to unknown others aside from the plaintiff as well. Such an undertaking would be an exercise in futility. Indeed, "if punitive damages were punishment for the full scope of the wrong to society, rather than simply the wrong to the plaintiff, it would make no sense to require a reasonable relationship between the amount of punitive damages and the amount of the individual plaintiff's compensatory damages." Colby, *supra*, 87 MINN. L. REV. at 607.

Permitting a plaintiff to recover a punitive damages award that reflects harms to non-parties is not simply facially incompatible with the ratio guidepost. It is also inconsistent with this Court's instructions regarding the proper application of the reprehensibility guidepost. In *State Farm*, the Court in fact "emphasized that courts cannot award punitive damages to plaintiffs for wrongful behavior that they did not themselves suffer." *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). The *State Farm* Court expressly rejected Utah's reliance on the defendant's "nationwide policies rather than * * * the conduct directed toward the Campbells," 538 U.S. at 420, as a basis for "awarding punitive damages to punish and deter conduct that bore no relation to the Campbell's harm." *Id.* at 422. It explained that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." *Id.* at 423. *See also White* v. *Ford Motor Co.*, 312 F.3d 998, 1015 (9th Cir. 2002) (holding that "the jury was permitted to engag[e] in a due process violation * * * when it arrived at its punitive damages award" because "it was permitted * * * to award damages to vindicate the interests of all Ford pickup truck buyers everywhere" and "measure damages by Ford's harm to the whole country").

Although *State Farm* held that a jury cannot *punish* a defendant for harm to non-parties, it did not foreclose a jury from considering additional harms to others in gauging the *reprehensibility* of the defendant's conduct. The Oregon Supreme Court thought this distinction too fine, *see* Pet. App.

18 n.3, but it is one ingrained in this Court's punitive damages jurisprudence. In *Gore*, the Court explained that "the fact that the Alabama Supreme Court correctly concluded that it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction does not mean that evidence describing out-of-state transactions is irrelevant in a case of this kind." 517 U.S. at 574 n.21. That evidence, the *Gore* Court explained, "may [instead] be relevant to the determination of the degree of reprehensibility of the defendant's conduct." *Id.* In addressing Gore's contention that BMW's conduct was particularly egregious because it constituted part of a "nationwide pattern" of nondisclosure, the Court additionally accepted that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." *Id.* at 576-577. In this regard, it observed that "[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance." *Id.* at 577.

The Court struck a similar chord in *State Farm*. It did not reject Utah's "recidivist" theory of punishment out of hand but held only that the facts of the case did not support it. *See* 538 U.S. at 423-424. Although "evidence of other acts need not be identical to have relevance in the calculation of punitive damages," *id.* at 423, the Court explained that the evidence proffered in the case "had nothing to do with a third-party lawsuit" and that "[o]ther evidence concerning reprehensibility was even more tangential." *Id.* at 424. Accordingly, the Court concluded that "[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance." *Id.* This Court's precedents thus clearly embrace the careful distinction that the ruling below rejected.

Permitting a jury to base a punitive damages award on speculations about harms to non-parties also suffers another

fundamental due process defect of constitutional magnitude. Of course, a plaintiff cannot recover any punitive damages from a defendant without first prevailing on the merits of his underlying lawsuit. *See* Colby, *supra*, 87 MINN. L. REV. at 607 ("Under current law, * * * a defendant cannot be made to pay punitive damages unless the plaintiff establishes an underlying civil cause of action[.]"). "[I]f the civil action fails for any reason, the defendant will escape liability for punitive damages." *Id.* Thus, the failure of proof on an element of a plaintiff's claim—*e.g.*, causation—or the existence of an affirmative defense—*e.g.*, the running of an applicable statute of limitations—will bar plaintiff's recovery of any damages, including punitive ones.

But permitting a plaintiff to recover an award premised on supposed harms that the defendant caused to others not involved in the litigation eliminates this basic requirement that a plaintiff prevail on the merits of his lawsuit. *Cf. id.* at 654 ("Because punitive damages are properly recoverable for each individual injury only if all of the elements of the underlying cause of action are present and there are no affirmative defenses, the defendant must be permitted to contest causation and other elements of the alleged tort on an individual basis with respect to the victim and to raise all affirmative defenses that it has against particular victims."). This essentially means that the defendant is subject to all of the downside of class action litigation without any of its corresponding procedural upside. *See Williams*, 378 F.3d at 797 ("Where there has been a pattern of illegal conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants. Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff, however, deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.").[10]

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[10] *See also* Colby, *supra*, 87 MINN. L. REV. at 655 ("[U]nder current law, if all of the victims were to join together in a class action, the defendant would be spared the expense of paying either compensatory damages or punitive damages for any class members

Thus, although "[t]he other wrongs allegedly resulting from the same course of [defendant's] conduct will be treated only peripherally and painted with a very broad brush" at trial, "[t]he jury will be permitted to punish the defendant for the whole lot of them." Colby, *supra*, 87 MINN. L. REV. at 654.

That state of affairs conflicts with the most elementary notions of due process. As this Court has held, " '[d]ue process requires that there be an opportunity to present every available defense.' " *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *American Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)). Indeed, if defendants are "barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would * * * be unconstitutionally deprived of their opportunity to be heard." *National Union Fire Ins. Co. of Pittsburgh* v. *City Sav., F.S.B.*, 28 F.3d 376, 394 (3d Cir. 1994). Consequently, juries cannot be permitted to award damages to individual plaintiffs based on speculative harms to non-parties consistent with basic protections afforded by the Due Process Clause.

B. Permitting Punitive Damages To Be Based On Theoretical Harms To Non-Parties Results In Excessive Punishment And Over-Deterrence.

Allowing a single plaintiff or a set of plaintiffs to recover a punitive award that reflects the entire harm caused by a defendant's course of conduct disregards the fact that other plaintiffs—in the same or other jurisdictions—may also bring suit and seek punitive damages. The consequence of such an approach is that a defendant is likely to be punished and deterred over and again for a single course of conduct—and increasingly severely, for "[o]ne excessive verdict, permitted to stand, becomes precedent for another still larger one." *Consorti* v. *Armstrong World Indus., Inc.*, 72 F.3d 1003, 1010 (2d Cir. 1995), *vacated & remanded on other grounds*, 518 U.S. 1031 (1996). The ineluctable result is thus punitive

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who could not individually establish their underlying cause of action."); *see generally* Fed. R. Civ. P. 23.

damages overkill—too much punishment, too much deterrence.

Various authorities have recognized that this problem bears a constitutional aspect. *See, e.g., Racich* v. *Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989); *In re School Asbestos Litig.*, 789 F.2d 996, 1003-1005 (3d Cir. 1986); *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839-840 (2d Cir. 1967). This Court has also voiced concern about it. In *State Farm*, the Court observed that punishment for harms done to others "creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." 538 U.S. at 423. *See also Gore*, 517 U.S. at 593 (Breyer, J., concurring) (noting that "[l]arger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover").

But the solution to the problem proposed by the Oregon Supreme Court in the ruling under review—*i.e.*, that a defendant can simply pay an award now and receive credit for it in later litigation—is neither novel nor realistic. Nearly 40 years ago, Judge Friendly memorably identified its flaws. He explained that "whatever the right result may be in strict theory, we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare." *Roginsky*, 378 F.2d at 840.

Aside from explaining that such an approach is unrealistic in practice, Judge Friendly also recognized that it inherently fosters inequity among the injured. *See id.* at 839-840 ("Neither does it seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers" because "most laymen and some judges would have some difficulty in understanding why presumably equally worthy plaintiffs in the other 75 cases before Judge Croake or elsewhere in the country should get less or none."). He is not

the only authority to question an approach that deprives future plaintiffs of their rightful share of punitive damages.[11]

Such an approach would discourage some plaintiffs from bringing suit for their injuries. *See* Colby, *supra*, MINN. L. REV. at 595 (unavailability of punitive damages may deter plaintiffs with low potential compensatory damages from suing). It also would encourage others to engage in a race to judgment, *see, e.g., Davis* v. *Celotex Corp.*, 420 S.E.2d 557, 565 (W. Va. 1992) ("[T]hose plaintiffs whose cases were heard first would gain the punitive monetary advantage."); Colby, *supra*, MINN. L. REV. at 595 (noting that punitive damages awarded to first-comers may bankrupt the defendant).

The Eighth Circuit recently identified a solution to this problem—a solution mandated by this Court's jurisprudence. That court explained that only "[t]ying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct." *Williams*, 378 F.3d at 797. Otherwise, "[i]f a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award." *Id.*

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[11] *See, e.g., Jackson* v. *Johns-Manville Sales Corp.*, 781 F.2d 394, 405 (5th Cir. 1986) (en banc) ("We believe that the Mississippi Supreme Court would not deny to its own citizens the right to recover that which citizens of dozens of other states are already entitled to recover."); *W.R. Grace & Co.* v. *Waters*, 638 So.2d 502, 505 (Fla. 1994) (court not willing to "place Floridians injured by asbestos on an unequal footing with the citizens of other states with regard to the right to recover punitive damages from companies who engage in extreme misconduct").

C. Punitive Exactions That Reflect Assumed Harms To Non-Parties Allow A Single Aberrant Jury To Override The Decisions Of Other Juries And Governmental Regulators.

The flip side of the duplicative punishment concern is the equally disturbing fear that—if juries are permitted to punish for the universal harm a product may have caused—a manufacturer may be punished for the entire supposed harm caused by a product defect that other juries, judges and federal regulators have found not to constitute a defect at all.

This is a problem that automobile manufacturers know too well, as noted above. In *Sand Hill Energy, Inc.*, *supra*, 83 S.W.3d 483 (Ky. 2002), the Supreme Court of Kentucky reinstated a $15 million punitive damages award for a Ford transmission design that NHTSA declined to find defective. And juries in 15 other jurisdictions also concluded that the transmission's design did not contain a defect.

The case of *Ford Motor Co.* v. *Ammerman*, 705 N.E.2d 539 (Ind. Ct. App. 1999), presents yet another troubling example of the problem posed by aberrant awards of punitive damages based on the assumed total harm caused by a product. Plaintiffs were ejected and seriously injured when the Bronco II in which they were passengers rolled over after it swerved to avoid colliding with another vehicle. *See id.* at 549. They alleged that the Bronco II was defective because its narrow track width and high center of gravity made it too susceptible to rolling over. *See id.* at 546. The jury found for plaintiffs, awarding more than $4 million in compensatory damages and a $58 million punitive award. *See id.* at 549. The trial court reduced that exaction to $13.8 million—a figure "represent[ing] Ford's retooling costs, along with an additional $54.00 representing the cost for additional hardware installed on each vehicle." *Id.* at 559. While other juries returned defense verdicts in Bronco II rollover cases, the reviewing court concluded the award was "not excessive." *Id.* at 564.

As with the multiple punishment problem, this one obviously cannot be solved by a pay now, credit later approach either—there may not be another successful plaintiff from whom a manufacturer could seek, let alone obtain, credit for punitive damages already paid to others. The upshot is that "a defendant that loses a single case would also lose the benefit of all previous victories against the same claim of misconduct." *Johnson* v. *Ford Motor Co.*, 113 P.3d 82, 94-95 (Cal. 2005).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Oregon should be reversed.

Respectfully submitted,

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